

(December 10. 1733.)

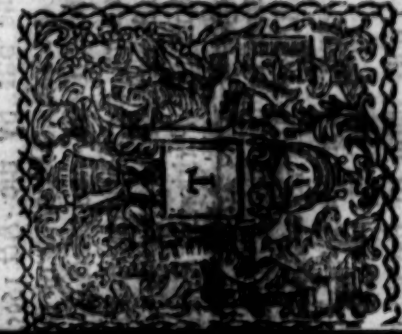
ANSWERS

FOR

Mary Murray Daughter of John Murray of Drumsfenebel,

TO

The Petition of Alexander Murray of Drumsfenebel, and others.



THE Case in Fact is, That John Murray of Drumsfenebel, the Petitioner's Grandfather and the Respondent's Father, was twice married, and by the Contract of Marriage with his first Wife provided his Lands of Drumsfenebel, and all his other Effects, to the Children of that Marriage; and of it there were three Children, Edward the eldest this Petitioner's Father, another Son, and the Respondent the only Daughter, and a great many Children of the second Marriage.

Edward, the eldest Son of the first Marriage, went abroad, where he continued about Thirty Years; and the Father indeed very wrongously thought fit to dispose his Estate by him to the eldest Son of the second Marriage; as the Respondent his only Daughter of the first Marriage, as Annallent thereafter; which Bond was dated in the 1708: But by the Influence of the Children of the second Marriage, he was made uneasy, on account of giving so much, and tho' the Bond was irrevocable; yet, the Respondent, out of Duty to her Father, renounced Five hundred Merks of the Sum, without the least Allowance for it.

The Father died in the 1718, or thereby, and the Son of the second Marriage took Possession of the Estate, who, as he was burdened with all his Father's Debts, was in Consequence also liable to this Provision: But before the Respondent got any Payment, Edward her Brother-german returned, and claimed the Estate, upon these two Grounds, 1^{mo}, That the Disposition to the Son of the second Marriage could not subsist with respect to the first Contract 2^{do}, That the Father could not grant such a Right, not having made up any Title to the Estate, to which Edward made up a Title by entering to a remoter Predecessor; and in the same Process he also insisted in a Reduction of a Tack for a low Duty let by the Father to another Son of the second Marriage; and prevail'd in the Reduction of both these Deeds, upon these two Grounds, and came to the peaceable Possession of the Lands.

As this Process long depended, the poor Sister in the mean Time behaved to ly out of her Money, since it was not certain who was to be liable for her Debt, till it should be determined who was to have the Land; and her Brother-german prevailing, and a little after dying, she brought this present Process against the Petitioner, who represents her Brother, for Payment; and the Cause having come before the Lord Maitland, his Lordship, after very full Hearing *decerned*: And the Defender reclaiming, your Lordships, upon Answers, *adhered*. And now again this new Petition is offered for the Defender; the principal Design whereof is, to weary out this poor Woman with Expences, while in the mean Time the Defender is in peaceable Possession of the Subject, which should pay her Debt.

What the Petitioner pleads comes to this, "1^{mo}, That it is alleged, that the Petitioner's Father could only be liable upon the Act 1695, as passing by the Granter "of the Bond, and making up his Title to a remoter Predecessor; but when Persons "are made liable upon that Statute, it is only for such Debts or Deeds of the triennial "Possessor as were onerous or rational: And the granting of 500 Merks of Provision to "the

" the Pursuer, as it was not onerous, so it was not rational, since it was an immo-
 " derate Provision, considering the Circumstances of the Estate and Debt; and there-
 " fore alledges, That before any Decree, there ought to be a Proof of the Value of
 " the Estate, and of the Debts upon it." And the Petitioner urges, as a Circumstance to
 " prove this Provision to be irrational, " That the Father, to seven younger Children of
 " a second Marriage, only granted 1000 Merks."

"Tis answered, 1mo, That the Respondent is well founded to plead, That the De-
 sender is not only liable upon the Act 1695, but that his Father was liable, as behaving
 as Heir to the Granter of the Bond, since in the Process against the Sons of the second
 Marriage, for reducing the Disposition and Tack granted to them, he pled upon the first
 Contract, which he could not do without being considered as Heir of Provision to
 his Father; and it was indeed principally upon that Contract he prevailed in the Re-
 duction.

But then, 2do, Even suppose he were no otherways liable but by the Act 1695,
 there cannot be a Doubt but the Father's Bond of Provision to his only Daughter of the
 first Marriage, for such a trifling Sum, would be held a rational Deed, and effectually
 obligatory against any Person that claims the Estate: For, to be sure, the Petitioner's Fa-
 ther would not have made such a Bustle to recover it, if it had not been of more Value
 than to afford such a small Portion to an only Daughter. And the Petitioner him-
 self owns, that a Provision to the Children of the second Marriage of 1000 Merks is in-
 stituted, gives sufficient Evidence this was too mean a Portion to the only Daughter
 of the first; and therefore in this Point it is hoped your Lordships will make no Diffi-
 culty to sustain the Provision, as a Debt affecting the Petitioner, even upon the Act
 1695.

The Petitioner alledges, 2do, " That by the Act 1695, he's only liable to the Value
 " of the Estate: And so it is, that there are more onerous Debts than exhaust the Estate
 " and craves your Lordships may allow a Diligence for citing the several Creditors, to
 " produce their Interest, since otherwise he may be liable for more than the Value."

It is answered, 1mo, In Fact it must evidently appear, this Pretence of exhausting
 the Value, is altogether affected for Delay; which will plainly appear from what the
 Petitioner himself owns, That the Bond of Provision, granted to the Children of the se-
 cond Marriage, is found a good Debt against him.

But, 2do, However 'tis true by the Statute. Heirs passing by are only declared liable
 to the Value, yet the Heir has no Right to delay the Person who seeks Payment, upon
 Pretence that there are Creditors to the Value, but must pay the first Corner, or suffer
 Decree to pass against him, unless he instantly instruct that he has paid to the Value.
 And which is a Rule, not only in this Case, but in all Cases where the Law declares
 Persons liable to the Value; so have your Lordships frequently found in the Case of
 Heirs served *cum beneficio*, as in the Decision Mrs. *Fanet Scot* contra Sir *Alexander*
Burnet of Lees, observed by *Hume*, July 4th, 1724; and in the Decision

against *McBrair of Netberwood*; so, even in the Case of Executors, Decree
 commonly pass, reserving to the Executors to suspend upon Multiply-poining.

And, if it were otherwise, it is obvious what Inconveniences would follow; a Hand-
 would be given to the Heir, not only to weary out the Creditors, but further, even to
 prefer whom he thought fit; for, as the Creditors will be preferred conform to their Di-
 ligence, he might oppose one, and allow another to go on to affect the Subject.

As to the Proposal made in the Petition of conjoining the Cause before the Lord
Grange with this, there is not the least Reason for it, they have not the least Con-
 nection.

In respect whereof, &c.



J. A. BOSWELL.